MOTION FILED

JAN 31 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

—v.—

GEORGE AIKIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae.* The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express their views in cases involving authors' rights under the Copyright Act. The decision on appeal is of grave concern to Authors League members because (i) it deprives authors of a valuable right granted by the Copyright Act; and (ii) it will deny several League members compensation for commercial exploitations of the music they compose for the stage (and license for broadcasting through ASCAP and other performing rights societies.) Because the issue is of such importance to its members, The Authors League respectfully applies for leave to file its brief *amicus curiae.* Counsel for the petitioners have consented to the filing of the brief.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Several of them compose music for musical comedies, revues and other works produced on the living stage, and license the broadcasting rights in their compositions through performing rights societies such as ASCAP. The decision below divests these authors of a right granted to them in Sec. 1(e) of the Copyright Act, as this Court recognized four decades ago. The decision also reflects a narrow interpretation of the Act, inconsistent with its Constitutional purpose.

Argument

The respondent's restaurants performed petitioners' copyrighted songs by presenting broadcast renditions of them over a radio set and connected loudspeakers. Respondent's use of these copyrighted compositions was identical with that which this Court unanimously held to be an infringement in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), for the reasons set forth in Mr. Justice Brandeis' lucid and logical opinion.

Fortnightly Corp. v. *United Artists*, 392 U.S. 390 (1968) did not reverse *Jewell-LaSalle*, and the rationale of *Fortnightly* does not justify reversal now.

In *Fortnightly*, the Court noted that "Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program." (392 U.S. at p. 397-8). It decided that Fortnightly did not "perform" because it only provided an antenna which "members of the public" could hookup to the "television sets . . . that they themselves provide"—and on which "they themselves . . . receive" the signals, and "themselves" select the programs they wish to view.

Here, and in *Jewell-LaSalle*, the employees and customers of respondent's restaurant (and LaSalle's hotel-public rooms) do not "themselves provide" the "(radio) sets" and do not "themselves" receive the broadcaster's signals and convert them into renditions of petitioner's copyrighted songs. Rather, as Mr. Justice Brandeis emphasized, what the customers in respondent's restaurants hear is "music produced by instrumentalities under its

control." And, as he noted, "There is no difference in substance between the case where a (restaurant) engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose." (at p. 201)

And it does not answer Mr. Justice Brandeis' analysis to argue that each customer "could" have listened to the same broadcast on his or her own portable radio. If each person had played his own set in respondent's restaurant, choosing his own program, the result would have been bedlam—not entertainment. More important, the same rendition of a work can be presented as a "public performance" to an audience, or can be obtained by individuals for private reception. For example: most radio stations perform copyrighted music by playing recordings of compositions. Members of their audiences can buy the same recordings and play them at home on their own phonographs. But the radio station's presentation of the recording is nonetheless a "public performance" which is protected by the composer's copyright and would be an infringement if made without his permission.

We submit that the respondent's use of petitioners' copyrighted songs meets the *Fortnightly* "functional" test of a performance. Moreover, it meets the equally significant criterion enunciated by Mr. Justice Holmes—the purpose for which the respondent presented petitioners' music to an audience. Here, as in *Herbert* v. *Shanley Co.*, "the purpose of employing it is profit and that is enough." 242 U.S. 591, 595.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae.